IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1

UNITED STATES
Petitioner

v.

THE DISTRICT COURT IN AND FOR
COUNTY OF EAGLE
AND STATE OF COLORADO
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO

AMICUS CURIAE BRIEF
FOR THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General

CHARLES B. [illegible],
Assistant Attorney General

HENRY W. [illegible],
Assistant Attorney General

Temple of Justice, Olympia, Washington 98501

STATE PRINTING PLANT, OLYMPIA, WASH., U.S.A.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1969

No. 1178

UNITED STATES
Petitioner

v.

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE
AND STATE OF COLORADO
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO

AMICUS CURIAE BRIEF FOR THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

CHARLES B. ROE, JR.,
Assistant Attorney General,

HENRY W. IPSEN,
Assistant Attorney General.

INDEX

TABLE OF CASES

UNITED STATES STATUTES

WASHINGTON STATE STATUTES

OTHER AUTHORITIES

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1969

No. 1178

UNITED STATES
Petitioner
v.
THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO
Respondent

AMICUS CURIAE BRIEF FOR THE STATE OF WASHINGTON

The State of Washington, by and through its Attorney General, files this Amicus Curiae brief under Rule 42(4) of this Court.

STATEMENT OF INTEREST

Most, if not all, of the states of the western United States have procedures for the "general adjudication" of water rights. The State of Washington included its variation thereof in the "Water Code of 1917." See RCW 90.03.110-RCW 90.03.240. During the 1920's and early 1930's an active state adjudication program was carried out. For various reasons this program became almost totally dor-

mant from the mid-1930's to the mid-1960's. In 1964 the State of Washington, through its Department of Conservation, reactivated an adjudication program. Three years later the State legislature placed greater emphasis on this program by creating a separate division of "adjudications" within the Department of Water Resources (the successor agency to the Department of Conservation) and appropriating a sizeable amount of money to fund its water rights adjudication activities. See RCW 43.27A.070. This program, which has since been transferred by Chapter 62, Laws of 1970 to the Department of Ecology, has been further expanded as each year has passed. The rulings on the issues raised in this case will have a direct impact on the progress which the State of Washington will make in its recently activated water rights adjudication program.

Since 1964 the State of Washington, relying on 43 U.S.C. 666, has joined the United States as a defendant in every water rights adjudication initiated in a superior court of the State of Washington in which the United States has been the owner of real property within the drainage of the stream system being adjudicated or has appeared to be a claimant of a right to divert from the stream system. Whenever the United States has been joined, it has fully participated in the same manner as every other claimant. In so doing it has presented its proof, including proof of "reserved rights," and,

from time to time, contested the claims of others. And in the one case during this period in which such a court has confirmed a water right to the United States in a final decree of adjudication, the United States has chosen not to appeal that decree. *In re Chiliwist Creek*, Okanogan County Cause No. 16323, (1967).

The State of Washington submits this brief because of concern that its adjudication program, which now for the first time incorporates a general adjudication providing for a truly full and complete determination of *all* claims on a stream system, may be disrupted if not completely upset by a possible "adverse" decision.

ARGUMENT

I. *The Issues:*

This brief will be limited to the discussion of two issues, namely:

A. Has the United States, by 43 U.S.C. 666, consented to be joined in a water rights adjudication of a *stream system which is tributary* to another stream?

B. Does the consent by the United States under 43 U.S.C. 666 to be joined in a water rights adjudication proceeding contemplate the adjudication of "reserved" water rights claimed by the United States?

II. *Position of Amicus Curiae*

A. Adjudication of "Tributary" Systems:

43 U.S.C. 666(a) provides for the joinder of the United States in an adjudication "of a river system or other source." In *State of California v. Rank*, 293 F.2d 340 (C.A. 9th 1961), the court wrote with regard to 43 U.S.C. 666 at page 347:

> "There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication of a stream system; one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated'."[1]

When Congress referred to the "adjudication . . . of a river system" it was referring to the "general adjudications" of streams that have been historically carried out in the western United States. An examination of such cases will reveal that not only "tributaries" but "tributaries to tributaries" were the types of "river system or other source" that were adjudicated generally throughout the west prior to the enactment of 43 U.S.C. 666.

Examples of general adjudications of such water sources in the State of Washington prior to 1952 include:

---

[1]This court wrote approvingly of the Ninth Circuit's position in *Dugan v. Rank*, 372 U.S. 609, 618, 82 S.Ct. 1000, 10 L. Ed. 16 (1963).

In re Beaver Creek, Cause No. 3935, Okanogan County (tributary to Methow River—tributary to Columbia River).

In re Bull Dog Creek, Cause No. 8576, Stevens County (tributary to Colville River—tributary to Columbia River).

In re Cheweka Creek, Cause No. 7545, Stevens County (tributary to Columbia River).

In re Cooke Creek, Cause No. 6222, Kittitas County (tributary to Yakima River—tributary to Columbia River).

In re Deadman Creek, Cause No. 2558, Garfield County (tributary to Snake River—tributary to Columbia River).

In re Doan Creek, 125 Wash. 14 (1923), (tributary to the Walla Walla River—tributary to the Columbia River).

In re Gold Creek, Cause No. 7076, Okanogan County (tributary to Methow River—tributary to Columbia River).

In re Johnson Creek, Cause No. 6126, Okanogan County (tributary to Okanogan River—tributary to Columbia River).

In re Sherwood Creek, Cause No. 9523, Stevens County (tributary to Colville River—tributary to Columbia River).

In re Stemilt Creek, Cause No. 18107, Chelan County (tributary to Columbia River).

Subsequent to the enactment of 43 U.S.C. 666, and beginning in 1964, the State of Washington has initiated 12 adjudications, all but one of which concern "tributaries" or "tributaries to tributaries." The United States has been joined as a party defendant in 9 of these. In only one case has the United States based a challenge to the court's

jurisdiction on the "tributary" issue.[2] In all others the United States has not contested the state courts' jurisdiction. Cases where the United States has joined as a defendant include:

In re Black Lake-Tarlett Slough, Cause No. 16320. Pacific County (discharges to Willapa Harbor).

In re Blockhouse Creek, Cause No. 10076, Klickitat County (tributary to the Little Klickitat River—tributary to the Klickitat River—tributary to the Columbia River).

In re Bonaparte Creek, Cause No. 17787, Okanogan County (tributary to Okanogan River—tributary to the Columbia River).

In re Chiliwist Creek, Cause No. 16323, Okanogan County (tributary to Okanogan River—tributary to Columbia River).

In re Harvey Creek, Cause No. 17651, Stevens County (tributary to Columbia River).

In re Magee Creek, Cause No. 17812, Stevens County (tributary to Columbia River).

In re Mill Creek, Cause No. 10077, Klickitat County (tributary to the Little Klickitat River —tributary to the Klickitat River—tributary to the Columbia River).

---

[2]In that case, *In re Chiliwist Creek*, Okanogan County Cause No. 16323, the Washington State Superior Court denied a motion of the United States to dismiss on the grounds that Chiliwist Creek was not a "river system or other source" within the meaning of 43 U.S.C. 666. The "Memorandum Decision" of the Court is set forth in Appendix A herein. See also *In re Chiliwist Creek*, Civil No. 2491 (E.D. Wash. May 29, 1964.)

The United States thereafter proceeded as any other defendant-claimant. ((*In re Chiliwist Creek* was later appealed to the Washington State Supreme Court. The Court's opinion is reported in 77 W.D.2d 666, 466 P.2d 513 (1970). Neither the United States nor 43 U.S.C. 666 were involved in that appeal however.))

In re Mountain Lake—Cascade Creek, Cause No. 2448, San Juan County (discharges into Puget Sound).

In re Narcisse Creek, Cause No. 17563, Stevens County (tributary to the Little Pend Oreille River—tributary to the Colville River —tributary to the Columbia River).

The position of the United States that 43 U.S.C. 666 only applies to an entire drainage or watershed, such as the Colorado River (or the Columbia River), is at direct odds with the historic subject matter of western water rights adjudications. It likewise conflicts with the obvious intent of Congress to develop in the states an ability to carry out a *complete* adjudication whereby *all* claimants might participate and establish rights one as against another on a comprehensive interrelated basis. This court may take judicial notice that the Columbia River drainage includes portions of seven states as well as Canada. If state court adjudication proceedings can only operate, so far as 43 U.S.C. 666 is concerned, on large multistate (and international) drainages then for practical purposes 43 U.S.C. 666 can very seldom be utilized in states in similar positions as the state of Washington. Obviously, Congress did not intend to enact such an ineffective statute.

B. Adjudication of "Reserved" Rights of the United States.

Since 1964 the State of Washington has consistently taken the position that the "reserved"

water rights of the United States may be determined in state courts under its adjudications procedures. Indeed, the courts of the State of Washington have so determined the extent of reserved rights claimed by the United States or are presently in the process of determining claims for water rights based on the reserved rights doctrine in three cases.[3]

Amicus Curiae will limit its argument on the reservation issue to only one point.

The United States states in its petition for a writ of certiorari in this case that if 43 U.S.C. 666 extends to reserved water rights "the way is open for . . . the courts of other western states to attempt to 'adjudicate' those rights out of exist-

---

[3]In the final decree in *In re Chiliwist Creek*, the Okanogan County Superior Court confirmed reserved water rights claimed by the United States as follows:

"As to the so-called 'reserved rights', the referee finds the claimant, based on the scope of the forest reservation as set forth in the Proclamations of the President of the United States establishing the Okanogan National Forest, and taking into account the quality of the soils, the natural flora and fauna and the topography of the lands in question, the climatic conditions, and past and present uses of the lands, is entitled with a priority date of 1897 to make use of the waters of Chiliwist Creek now and in the future in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest reserve lands were reserved; namely, timber management and production and related purposes including fish and wildlife management, livestock grazing, and recreational activities."

Decree of Judge Robert J. Murray, dated May 16, 1967. See the comment on the case in 1 *Wheatley and Corker, Study of the Development, Management and Use of Water Resources on the Public Lands*, 137 (1969). See also comment, *20 Stan.L.Rev.* 1187 at 1192 (1968).

ence."[4] As previously stated, claims for reserved rights by the United States have been submitted in water rights adjudications cases to various superior courts in the State of Washington. In *In re Chiliwist Creek, supra*, a water right based on the reservation doctrine was granted. There is no reason to believe, based on recent experience, that the courts of this state will depart from the practice of fully and fairly considering the claims of the United States just as they do all other claims. The position of the United States that the Courts of the western states will "adjudicate" away valuable property rights of the United States appears to be a "straw man" and should be treated as such.

The State of Washington is certainly willing to admit its dissatisfaction with certain aspects of the reservation doctrine because of its potential for extinguishing the value of presently exercised state based water rights and for complicating future state water planning efforts. (Hopefully, through future congressional action, some of the potential inequities of the reserved rights doctrine will be eliminated.) This dissatisfaction should not, however, lead to a conclusion that states in their court adjudications of water rights will deny claims for water rights because they are based on locally unpopular doctrines. Recent judicial action in Washington State does not bear out the federal government's apprehensions.

[4]See "Petition for a Writ of Certiorari of the United States" at page 16.

SUMMARY

The State of Washington's view is that the United States has consented to be sued by 43 U.S.C. 666 in state water rights adjudications which involve a "tributary system" to the main stem of a stream. It is further submitted that consent under 43 U.S.C. 666 includes within its scope the adjudication of "reserved" water rights of the United States in state courts.

Respectfully submitted,

SLADE GORTON,
Attorney General
CHARLES B. ROE, JR.,
Assistant Attorney General,
HENRY W. OLSEN,
Assistant Attorney General.

Attorneys for Amicus Curiae
State of Washington

July 1970

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR OKANOGAN COUNTY

In the Matter of the Determination of the Rights to the Use of the Waters of Chiliwist Creek and its Tributaries in Okanogan County, Washington, in Accordance With the Provisions of Chapter 90.03 Revised Code of the State of Washington.

M. G. Walker, as Supervisor of Water Resources for the State of Washington,

Plaintiff,

vs.

Biles-Coleman Lumber Company, et al.

Defendants.

MEMORANDUM DECISION

No. 16323

The supervisor of water resources for the State of Washington initiated a proceeding pursuant to R.C.W. 90.03 to adjudicate the waters of Chiliwist Creek in Okanogan County. It would appear the United States may own land in the water shed and it is trustee for an Indian ward allottee having lands within the water shed, and is joined as a party. It appears that all of the persons who claim or might claim the right to the use of waters within this water shed have also been joined. In other words, this proceeding was initiated for the purpose of

completely adjudicating the waters of Chiliwist Creek.

The United States and T. B. Charley (the Indian ward) initiated a proceeding in Federal Court to remove the proceeding to the Federal District Court for trial and determination under the provisions of Sections 1446 and 1447 of Title 28, U.S.C. The State of Washington moved to remand back to State Court and thereafter the United States moved to dismiss the United States and T. B. Charley on the ground the Superior Court of Okanogan County had no jurisdiction and therefore the District Court had no jurisdiction, and that the proceeding was not a general adjudication of water rights so as to bring the proceeding within 43 U.S.C. 666. May 29, 1964, the District Court ruled that the United States had waived its right to immunity in 43 U.S.C. 666, and announced agreement with the decision in In re Green River Drainage Area, 147 Fed. Sup. 127 (1956). An Order of Remand was filed June 24, 1964. Said Order reserved a rule upon the motion to dismiss to the State Court.

It is to be noted that the opinion in Federal Court and the Order pursuant thereto holds that the State Court has jurisdiction of a water rights case under 43 U.S.C. 666. It seems to be somewhat of a question as to what this Court can now decide. The Federal Court's decision would seem to be that the facts of this case place it within the coverage of said Section 666, and if the Order of the Federal

Court so decided, then it must necessarily have decided also that this stream is a "river system or other source." This would mean that the motion here urged has already been passed upon and is adjudicated by the Order of the Federal Court. In any event, the question of what is or what is not a river system is well nigh impossible to answer. This writer has seen many streams called creeks larger than other streams called river and, of course, vice versa. In this case it appears that all persons who might have any claim to the waters of Chiliwist Creek were joined. Chiliwist Creek, during flood time at least, is a tributary of the Okanogan River, the Okanogan River during all times known to this writer has been a tributary of the Columbia River (but this now graying head has seen the time when an extra cow or two drinking from it would have prevented any portion thereof from reaching the Columbia River). The Columbia River, of course, flows into the Pacific Ocean. The Government contends that all waters within a "river system" must be adjudicated, which would mean in this case that all of the waters of the Columbia River, the Snake River, and the numerous other rivers extending throughout some of the provinces of Canada and several of the United States would have to be involved. It does not seem to this Court that Congress had this latter theory in mind when 666 was enacted.

The statute says, ". . . for the adjudication of rights to the use of water of a *river system* or

other source, . . ." Webster's dictionary defines a "river" as a stream larger than a brook or a creek. This is a rather anomalous description; if the person who named this stream had first came upon it in flood time, perhaps it would now be called Chiliwist River. Webster's dictionary defines "source" as "the beginning of a stream of water or the like; a spring; a fountain." It would thus appear that the statute would authorize adjudication of a mere trickle so long as it constituted the beginning of a stream.

This Court is of the opinion that the Green River Case above mentioned correctly construed the intent of Congress in a realistic and practical fashion; and that any other construction would depart from the purpose Congress had in mind when this statute was enacted.

The motion of the United States and of T. B. Charley to be dismissed from the proceeding will be denied.

DATED THIS 26th day of February, 1965.

/s/ Robt. J. Murray
ROBT. J. MURRAY,
Judge.